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IN THE

Supreme Court of the United States

OCTOBER TERM 1946

No. 1231

PHILIP FRIED and GEORGE NEARY,
Petitioners,

against

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit

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PETITIONERS' REPLY BRIEF

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RICHARD J. BURKE,
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The Government by misstating the question (Br. p. 2) seeks to make it appear that petitioners desire to review the finding of fact that Neary consented to the seizure. But what petitioners are urging is a pure question of law arising out of this finding, viz., can officers secure a consent which the law will regard as valid from one whom they have unconstitutionally arrested and are depriving unconstitutionally of his liberty? Furthermore, can a valid consent be obtained from one so detained who is denied his request for an opportunity to consult counsel before consenting?

The Government says that the admitted invalidity of the warrant bears no causal relation to the consent (Br. p. 12). The Government twice speaks of the search and seizure as "incident to the arrest" (Br. pp. 2, 5), apparently seeking thus to impart an atmosphere of legality to what took place. But the law has never justified searches as incidental to an *unlawful* arrest. And this error highlights the Government's fundamentally wrong point of view, for the agents were trespassers, they had no right at all to be on the premises, much less to arrest those they found there. They were committing a crime (Sec. 53a, Tit. 18 U. S. C.) as well as violating the petitioner's constitutional rights. What happened thereafter was vitiated *ab initio,* unless the end justifies the means.

In other words, the Government claims that it may be brushed aside as inconsequential that the person consenting is under illegal arrest (though he is misled into believing himself legally arrested) and is unconstitutionally deprived of liberty. Can it seriously be maintained that even if no arrest had been made, Neary would just as probably have turned over the company's books and records to be carried away by the FBI? No one can know this, but it seems at least highly unlikely. Human experience does not show that businessmen who are willing to have their plants inspected for stolen goods are equally willing to turn over all their books and records.

Even a legal arrest has an obvious effect on the mind of the arrested person. This is not to say that his subsequent statements or acts are therefore involuntary. But they are at least partially *motivated* by the situation in which he finds himself. If the arrest is legal, the fact that the arrested person may be serving what he considers his best interests under those circumstances will not vitiate his acts or statements. The arresting officers are doing no wrong.

But where the arrest is illegal and unconstitutional, the arrested person is laboring under a set of circumstances wrongfully created by the officers in violation of his

rights,—his consent is given in a wrong and misleading context, since the agents are acting under color of right, and he believes himself to be validly under arrest. Courts should not then be permitted to indulge in a "nice calculation" (forbidden in *Glasser* v. *United States,* 315 U. S. 60, 76) as to the *amount* of influence the constitutional violation had upon his mind.

That confessions or admissions are more likely to be secured from an arrested than from a free person is obvious, and common knowledge. This led Judge Learned Hand to say in *United States* v. *Heitner,* 149 Fed. (2d) 105, that "It is a reasonable—indeed an inevitable—inference that the admission resulted from the arrest in the sense that Cryne would not have answered, had he not been in custody." He did not mean that that would vitiate the admission, if the arrest were legal—but only that if the arrest were illegal, a quantum of the causality of the admission would be the officer's own illegal act, and this would make it incompetent. And in *Nueslein* v. *Dist. of Col.,* 115 Fed. (2d) 690 (App. D. C., *per* Vinson, J.), it was felt that a voluntary admission obtained by means of an unconstitutional search should be excluded. This must be so, unless the officers' unlawful acts can be allowed to profit them in the end. But if this is true of confessions or admissions, why should it be less true of consents or waivers?

Why should a waiver of a constitutional right be held effective, which, if it had been instead an admission or confession, would have been rendered incompetent? A statement of consent to search does not differ essentially from an admission, but it may have far more prejudicial consequences.

Respectfully submitted,

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